

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 8, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2886-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ISRAEL SALDANA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Israel Saldana appeals from a judgment of conviction of attempted first-degree homicide and first-degree homicide, both as a party to the crime. He also appeals from an order denying his postconviction motion based on a claim of ineffective assistance of trial counsel. We reject Saldana's claim that trial counsel was deficient for improper advice about party to

the crime liability, in choosing the theory of defense, and for not challenging the alleged staleness of a search warrant. We affirm the judgment and the order.

Saldana was convicted for his involvement in a shooting which occurred at about 1:00 a.m. in a Racine tavern. A fight had ensued in the tavern and Saldana had called fellow gang member Bobby Ayala to render assistance. Ayala brought a gun. It is not clear whether Saldana or Ayala fired the gun into the hallway near the tavern. One person was killed and another wounded by the shots.

Saldana was first charged for the direct commission of the crimes. Six months later an amended information was filed charging Saldana as a party to the crime. Saldana contends that when discussing the plea offer¹ with trial counsel, counsel misinformed or misled Saldana about the law governing party to the crime liability. Saldana claims that had he been properly informed, he would have accepted the plea agreement. Saldana seeks reversal of his conviction and an opportunity to enter a plea pursuant to the rejected plea offer.

“There are two components to a claim of ineffective trial counsel: a demonstration that counsel’s performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components.” *State v. Smith*, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel’s actions constitute ineffective assistance is a mixed question of law and fact. *See State v. Sanchez*,

¹ Two plea offers were made. One was shortly before the amended information was filed. The offer was to have Saldana enter a plea to first-degree reckless homicide and attempted first-degree reckless homicide with a sentencing recommendation capped at fifty years. A second offer was made just before trial and was characterized by trial counsel as better than the first offer.

201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See id.*

The right to effective assistance of counsel applies to advice as to whether a defendant should accept or reject a plea bargain. *See State v. Fritz*, No. 96-1905-CR, slip op. at 8 (Wis. Ct. App. July 8, 1997, ordered published Aug. 26, 1997). "A defendant who claims that he or she would have accepted a plea bargain if the trial lawyer had not been constitutionally deficient is not foreclosed from showing prejudice by the fact that he or she has had a fair trial." *Id.*, slip op. at 11.

Specifically Saldana argues that trial counsel failed to advise him that he could be found guilty of unintended crimes if they were the reasonably foreseeable consequence of other intentional criminal acts to which Saldana admitted.² The trial court found that Saldana's trial counsel understood the law of party to the crime liability and that counsel did not mislead Saldana on the applicable law. Implicit is the trial court's finding that counsel in fact advised Saldana in the manner which counsel testified to at the *Machner* hearing.

Trial counsel indicated that he told Saldana:

You could be convicted just because you're in the gang and one of your gang members shot, and the jury could convict you for that. Whether it's right or not. I said if you were

² The shooting was precipitated by attempts of tavern patrons to stop gang members from writing graffiti in the bathroom. Saldana made threats to tavern patrons that the tavern was part of the gang's "hood" and that the gang would defend it. Saldana admitted to fighting.

there and you knew Bobby had a gun, that's party to. If you're asking for Bobby's help and he's got a gun, that's party to.

Counsel's explanation was reasonable under the circumstances. Counsel did not use legal jargon about "foreseeable consequences" to explain party to the crime liability to Saldana. Rather, counsel used an example of how Saldana could be found responsible and correctly stated that Saldana could be found guilty if a person rendering him assistance had and used a gun. The advice was stated in terms Saldana could understand. Saldana's rejection of the plea offer was not based on improper advice about party to the crime liability but rather on Saldana's perception that the gun was an unexpected tool of defense in the tavern fight.³ Trial counsel's performance was not deficient with respect to advice about the law of party to the crime liability.

Saldana also claims that trial counsel performed deficiently by adopting a theory of defense which was based on an erroneous understanding of the law. Saldana contends that counsel proceeded only on the theory of proving that Saldana was not the shooter and ignored aspects of the party to the crime liability. Contrary to Saldana's claim, trial counsel did not concede in his closing argument that party to the crime liability was indefensible.⁴ By his comments, counsel was attempting to persuade the jury that it was not enough for liability that Saldana was present. Rather than ignore the party to the crime liability, trial

³ Saldana contends that portions of trial counsel's closing argument demonstrate counsel's misunderstanding of party to the crime liability because counsel focused on proof that Saldana was not the shooter. However, the argument was consistent with the theory of defense that Saldana was not the shooter and had not given any direction that a gun be brought to the fight.

⁴ Trial counsel stated, "If he's guilty because he shot or he's guilty because he didn't shoot, there is nothing I can do. I might as well quit. I mean, what can I tell you?"

counsel's theory of defense was to establish that the use of the gun was not an expected consequence of Saldana's call for help in the tavern fight. Saldana testified that he did not want a gun used in the fight, that he did not expect a gun to be used, that in calling for help he was merely looking to fist fight the men in the tavern, and that he attempted to stop the shooter as soon as he saw the gun. That evidence reflecting negatively on this theory of defense was elicited on Saldana's cross-examination⁵ does not render counsel's performance deficient. Counsel could not change the facts from which he had to fashion a defense. Counsel is not deficient and Saldana is not entitled to revive a rejected plea offer simply because the defense was not successful. *See State v. Teynor*, 141 Wis.2d 187, 212, 414 N.W.2d 76, 85 (Ct. App. 1987).

Six months before the commission of the crimes, police executed a search warrant on Saldana's residence to investigate possible drug trafficking. A notebook and calendar with gang-related information were seized during the search. These items were admitted at Saldana's trial as evidence of his gang affiliation.

Saldana argues that the police officer's affidavit in support of the search warrant was insufficient to establish probable cause because it was not clear whether the confidential informant had observed a drug purchase at Saldana's residence seventy-two hours before the affidavit was made or whether the information came to the police officer within that period.⁶ He also claims that the

⁵ Saldana admitted that he was the gang leader, that he had fired the gun hours earlier while chasing off rival gang members, and that gang members had access to and carried weapons.

⁶ The affidavit recited:

Your affiant, within the last 72 hours was contacted by a reliable confidential informant (CI), who told your affiant that the CI had

(continued)

search warrant was not timely executed because it was not executed until five days after its issuance. He claims that trial counsel was deficient for not challenging the validity of the search on “staleness” grounds.⁷

We conclude that Saldana was not prejudiced by trial counsel’s failure to argue staleness. When this court gauges whether there was sufficient evidence to support a warrant, we give substantial deference to the issuing judge’s determination. See *State v. Ehnert*, 160 Wis.2d 464, 468, 466 N.W.2d 237, 238 (Ct. App. 1991). We only gauge whether the facts offered in support of the warrant established a “fair probability” that the desired evidence would be found at the targeted location. See *State v. Anderson*, 138 Wis.2d 451, 468, 406 N.W.2d 398, 406 (1987). “As to ‘staleness,’ ‘the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.’” *Ehnert*, 160 Wis.2d at 469, 466 N.W.2d at 238 (quoted source omitted). The issuing judge may consider the ongoing nature of the criminal activity as diminishing the significance of the passage of time. See *id.* at 469-70, 466 N.W.2d at 239.

Although not clearly stated, a reasonable inference arises from the affidavit that the confidential informant had observed a cocaine sale within

observed a Hispanic male making sales of cocaine from the residence

⁷ At trial Saldana brought a motion to suppress the search warrant on the grounds that the affidavit had not been signed and the warrant did not specifically authorize seizure of gang-related materials.

seventy-two hours of the making of the affidavit.⁸ The occurrence justifying a search was not stale. Moreover, the on-going nature of drug trade made the passage of time between the observed drug transaction and the application for a search warrant insignificant.

The same is true with respect to the five-day wait before the warrant was executed.⁹ Probable cause does not dissipate by the passage of time alone. *See State v. Edwards*, 98 Wis.2d 367, 372, 297 N.W.2d 12, 14 (1980). It is the defendant's burden to prove that the probable cause upon which the warrant was originally issued had dissipated by the time the warrant was executed. *See id.* at 377, 297 N.W.2d at 16. Saldana contends that there were no grounds to believe that after five days drug trafficking was ongoing at the residence because no cocaine was found and the confidential informant gave no information about the amount of drugs observed or familiarity with the interior of the residence or the drug dealer as would be occasioned by frequent drug activity. The after-the-fact circumstance that no drugs were found at the residence cannot destroy probable cause existing before execution of the warrant. Saldana's contention that there was no indication that the drug transaction observed by the informant was anything other than an isolated occurrence is simply an inferential difference. The affidavit set forth the police officer's experience in drug trade suggesting that where there is one sale there is often more and other evidence of drug activity. It

⁸ Trial counsel testified that he interpreted the search warrant affidavit to mean that the informant had observed the drug transaction within seventy-two hours. The police officer testified at the postconviction hearing that the informant had observed the transaction within seventy-two hours. The police officer's testimony bears out that trial counsel's interpretation was reasonable.

⁹ The warrant was executed within the five-day statutory limit under § 968.15, STATS. *See State v. Edwards*, 98 Wis.2d 367, 371, 297 N.W.2d 12, 14 (1980).

is a reasonable inference from the affidavit that drug activity at the residence was ongoing such that the passage of time did not dissipate probable cause.

Moreover, Saldana was not prejudiced by counsel's failure to raise staleness issues in attacking the search warrant because those claims would not have been successful. The admission of the gang-related notebook and calendar was de minimus in light of other testimony during the prosecution's case-in-chief about Saldana's gang affiliation.¹⁰ Trial counsel was not ineffective with respect to admission of the evidence seized under the search warrant.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

¹⁰ The tavern bartender testified that gang members were writing gang graffiti in the bathroom and that Saldana was among them. A witness to the initial confrontation in the bathroom testified that Saldana had identified himself and his friends by naming their gang affiliation. Another patron indicated that Saldana had described the tavern as being the gang's "territory." Ayala's sister confirmed that Saldana and Ayala belonged to the gang. Saldana's brother testified that Saldana was the gang leader and that Saldana had two gang nicknames. Even the police officer qualified as an expert on gang affiliations was able to testify about Saldana's role in the gang without reference to the seized notebook and calendar.

